

DEPARTMENT OF THE TREASURY

31 CFR Part 50

RIN 1505-AA99

Terrorism Risk Insurance Program

AGENCY: Departmental Offices, Treasury

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Treasury (Treasury) is issuing this proposed rule as part of its implementation of Title I of the Terrorism Risk Insurance Act of 2002 (Act). The Act established a temporary Terrorism Risk Insurance Program (Program) under which the Federal Government will share the risk of insured losses from certified acts of terrorism with commercial property and casualty insurers until the Program sunsets on December 31, 2005. This notice of proposed rulemaking would apply provisions of the Act to State residual market insurance entities and State workers' compensation funds which are insurers under the Program. This is the third in a series of regulations that Treasury will issue to implement the Act.

DATES: Written comments may be submitted on or before [INSERT DATE THAT IS 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]

ADDRESSES: Submit comments (if hard copy, preferably an original and two copies) to Office of Financial Institutions Policy, Attention: Terrorism Risk Insurance Program Public Comment Record, Room 3160 Annex, Department of the Treasury, 1500 Pennsylvania Ave., N.W., Washington, DC 20220. Because paper mail in the Washington, D.C. area may be subject to delay, it is recommended that comments be

submitted by electronic mail to: triacomments@do.treas.gov. All comments should be captioned with “[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] NPRM TRIA Comments.” Please include your name, affiliation, address, e-mail address and telephone number in your comment. Comments will be available for public inspection by appointment only at the Reading Room of the Treasury Library. To make appointments, call (202) 622-0990 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Mario Ugoletti, Deputy Director, Office of Financial Institutions Policy (202) 622-2730, or Martha Ellett or Cynthia Reese, Attorney-Advisors, Office of the Assistant General Counsel (Banking & Finance), (202) 622-0480 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

I. Background

A. Terrorism Risk Insurance Act of 2002

On November 26, 2002, President Bush signed into law the Terrorism Risk Insurance Act of 2002 (Public Law 107-297, 116 Stat. 2322). The Act was effective immediately. Title I of the Act establishes a temporary Federal program of shared public and private compensation for insured commercial property and casualty losses resulting from an act of terrorism as defined in the Act and certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General. The Act authorizes Treasury to administer and implement the Terrorism Risk Insurance Program, including the prescription of regulations and procedures. The Program will sunset on December 31, 2005.

The Act's purposes are to address market disruptions, ensure the continued widespread availability and affordability of commercial property and casualty insurance for terrorism risk and to allow for a transition period for the private markets to stabilize and build capacity while preserving State insurance regulation and consumer protections.

The amount of Federal payment for an insured loss resulting from an act of terrorism is to be determined based upon the insurance company deductibles and excess loss sharing with the Federal Government, as specified by the Act. Thus, the Program provides a Federal reinsurance backstop for a temporary period of time. The Act also provides Treasury with authority to recoup Federal payments made under the Program through policyholder surcharges, up to a maximum annual limit.

Each entity that meets the definition of "insurer" (well over 2000 firms) must participate in the Program. The Act includes State residual market insurance entities and State workers compensation funds in the definition of insurer but requires Treasury to issue regulations as soon as practicable to apply the provisions of the Act to these insurers.

From the date of enactment of the Act through the last day of Program Year 2 (December 31, 2004), insurers under the Program must "make available" terrorism risk insurance in their commercial property and casualty insurance policies and the coverage must not differ materially from the terms, amounts and other coverage limitations applicable to commercial property and casualty losses arising from events other than acts of terrorism. The Act permits Treasury to extend the "make available" requirement into Program Year 3, based on an analysis of factors referenced in the study required by section 108(d)(1) of the Act, and not later than September 1, 2004.

An insurer's deductible increases each year of the Program, thereby reducing the Federal Government's involvement prior to sunset of the Program. An insurer's deductible is based on "direct earned premiums" over a statutory Transition Period (now expired) and the three Program Years. Once an insurer has met its deductible, the Federal payments cover 90 percent of insured losses above the deductible, subject to an aggregate annual cap of \$100 billion. The Act prohibits duplicative payments for insured losses that are covered under any other Federal program.

As conditions for Federal payment under the Program, insurers must provide clear and conspicuous disclosure to the policyholders of the premium charged for insured losses covered by the Program, and must submit a claim and certain certifications to Treasury. Treasury will be prescribing claims procedures at a later date.

The Act also contains specific provisions designed to manage litigation arising from or relating to a certified act of terrorism. Section 107 creates an exclusive Federal cause of action, provides for claims consolidation in Federal court and contains a prohibition on Federal payments for punitive damages under the Program. This section also provides the United States with the right of subrogation with respect to any payment or claim paid by the United States under the Program. As part of the claims process, and as directed by the President, Treasury will be issuing regulations addressing Treasury's role in the approval of settlements.

B. Previously Issued Interim Guidance

To assist insurers, policyholders and other interested parties in complying with immediately applicable and time-sensitive requirements of the Act prior to the issuance of regulations, Treasury issued interim guidance in four separate notices. Treasury publicly released these interim guidance notices on its Program website, www.treasury.gov/trip and published each notice in the Federal Register.

Treasury released the first notice of Interim Guidance on December 3, 2002, within a week of the Act's enactment (Interim Guidance I). Interim Guidance I was published at 67 FR 76206 on December 11, 2002, and addressed several issues pertaining to immediately applicable provisions of the Act, including statutory disclosure obligations of insurers as conditions for Federal payment under the Program and the requirement that an insurer "make available" terrorism risk insurance. The disclosure guidance in Interim Guidance I references certain model forms of the National Association of Insurance Commissioners (NAIC) and provides a safe harbor for those insurers that make use of such forms prior to the issuance of regulations, but Interim Guidance I stated that these forms are not the exclusive means by which insurers could comply with the disclosure conditions prior to the issuance of regulations. Interim Guidance I also provided guidance concerning the "direct earned premium" on lines of property and casualty insurance to enable insurers to calculate their "insurer deductibles" and enable insurers to price and disclose premiums for terrorism risk insurance to policyholders within statutory time periods.

On December 18, 2002, Treasury issued a second notice of interim guidance. This interim guidance was published at 67 FR 78864 on December 26, 2002 (Interim Guidance II). Interim Guidance II addressed the statutory categories of "insurers" that

are required to participate in the Program, including their “affiliates;” provided clarification on the scope of “insured loss” covered by the Program and provided additional guidance to enable eligible surplus line carriers listed on the Quarterly Listing of Alien Insurers of the NAIC or Federally approved insurers to calculate their insurer deductibles for purposes of the Program.

On January 22, 2003, Treasury issued a third notice of interim guidance, published at 68 FR 4544 on January 29, 2003 (Interim Guidance III). Interim Guidance III further clarified certain disclosure and certification questions, issues for non-U.S. insurers, and the scope of the term “insured loss” under the Act.

On March 25, 2003 Treasury issued a fourth interim guidance published at 68 FR 15039 on March 27, 2003 (Interim Guidance IV). Interim Guidance IV provided insurers a procedure by which they could seek to rebut a presumption of control established in Treasury’s first set of interim final regulations. See Previously Issued Regulations in section C below and Treasury’s website at www.treasury.gov/trip.

In issuing each notice of Interim Guidance, Treasury stated that the Interim Guidance may be relied upon by insurers until superseded by regulations or a subsequent notice. Treasury provided safe harbors for actions by those insurers taken in accordance with, and in reliance on, the interim guidance for the time period prior to the issuance of regulations.

C. Previously Issued Regulations

Treasury published the first regulation implementing the Act on February 28, 2003 (68 FR 9804) as an interim final rule together with a proposed rule. Both request comments by March 31, 2003. The first regulation, which is Subpart A of new Part 50 in

Title 31 of the CFR, covers the purpose and scope of the Program, key definitions, and certain general provisions.

In addition, Treasury has published an interim final rule on requirements concerning disclosures that insurers must make to policyholders as a condition for federal payment under the Act, and requirements that insurers make available, in their commercial property and casualty insurance policies, terrorism risk coverage for insured losses under the Program. (See Subparts B and C of 31 CFR Part 50).

II. The Proposed Rule

Section 102(6) of the Act includes State residual market insurance entities and State workers' compensation funds as insurers that are required to participate in the Program. Section 103(d) of the Act requires Treasury to "issue regulations, as soon as practicable after the date of enactment of this Act, that apply the provisions of this title [Title I] to State residual market insurance entities and State workers' compensation funds." Pursuant to this statutory directive, Treasury is issuing this notice of proposed rulemaking.

A. Mandatory Participation as an "Insurer"

State residual market insurance entities and State workers' compensation funds have been established to provide insurance coverage where private insurance companies are unwilling or unable to provide coverage. Private insurance companies may be unwilling or unable to provide coverage because of the policyholder's risk profile or because the economics of a particular transaction are not consistent with the types of risk the insurer is willing or able to underwrite. In some cases a residual market entity shares the risks of its underlying policies with insurance companies that provide certain types of

coverage within the state, and in other cases a residual market entity operates on a stand alone basis.

All entities that meet the definition of “insurer” in section 102(6)(A) and (B) and, if prescribed by Treasury, criteria in 102(6)(C), of the Act are required to participate in the Program. Section 102(6)(A)(iv) includes State residual market insurance entities and State workers’ compensation funds in the definition of insurer for purposes of the Program. Treasury considers the term State residual market insurance entity to encompass all such residual market entities that arrange for or provide commercial property and casualty insurance coverage. This includes residual market entities associated with the provision of commercial property, liability, workers’ compensation, and automobile (including State automobile funds) coverage. Section 102(6)(B) provides an exception to the direct earned premium requirement for State residual market entities and State workers’ compensation funds. Treasury has issued no regulatory criteria under section 102(6)(C). Therefore, State residual market insurance entities and State workers’ compensation funds are insurers covered by the Program and required to participate in the Program. Section 103(d) of the Act requires Treasury to issue regulations as soon as practicable to apply the provisions of the Act to these types of insurers.

Following consultation with the NAIC, Treasury identified a group of entities that falls within the category of State residual market insurance entities and State workers compensation funds. Treasury included this list as part of its Interim Guidance II (67 FR 78864). In that notice of interim guidance, Treasury also requested that any State residual market insurance entity or State workers’ compensation fund, not included on

the list, notify Treasury. In response, Treasury received additional information and a number of suggestions concerning the State residual market entities and State workers' compensation funds on the list. After consideration of this additional information and further consultation with the NAIC, Treasury has updated and expanded the initial list in the interim guidance of State residual market insurance entities and State workers' compensation funds. This revised list will be updated as necessary, and publicly available at www.treasury.gov/trip.

B. Treatment or Allocation of Premium

Section 103(d)(2) of the Act divides State residual market insurance entities into two broad classes for purposes of their treatment as insurers under the Program: (1) entities that do not share profits and losses with private sector insurance companies; and (2) entities that do share profits and losses with private sector insurance companies. Section 103(d)(2)(A) provides that “a State residual market insurance entity that does not share its profits and losses with private sector insurers shall be treated as a separate insurer.” For State residual market insurance entities that fall under section 103(d)(2)(A) or for State workers' compensation funds Treasury is proposing that these entities follow the regulatory guidelines set forth in 31 CFR §50.5(d)(1) or 50.5(d)(2) for the purposes of calculating the appropriate measure of direct earned premium.

Section 103(d)(2)(B) of the Act provides that “a State residual market insurance entity that shares its profits and losses with private sector insurers shall not be treated as a separate insurer, and shall report to each private sector insurance participant its share of the insured losses of the entity, which shall be included in each private sector insurer's insured losses.” Section 103(d)(3) further provides that “any insurer that participates in

sharing profits and losses of a State residual market insurance entity shall include in its calculations of premiums any premiums distributed to the insurer by the State residual market insurance entity.” A significant number of State residual market entities share their profits and losses with private sector insurance companies, including entities that arrange for commercial automobile, property, and workers’ compensation coverages. In addition, some State residual insurance market entities contract with private sector insurance companies, which act as servicing carriers. In a servicing carrier arrangement, a private sector insurance company issues and services the residual market entity’s policies in exchange for a servicing fee. The servicing carrier does not bear the ultimate risk of such policies, but rather that risk is shared by all the insurance companies that participate in the residual market. However, other residual market entities (*e.g.*, most property plans) do not use servicing carriers but, instead, issue and service their policies directly.

As mentioned in Interim Guidance II, Treasury has consulted with the NAIC to develop a proposed allocation methodology that is in accord with statutory requirements. In order to implement the requirements of section 103(d)(2)(B)(no separate treatment) and 103(d)(3) (inclusion of premium income) for State residual market insurance entities that share profits and losses with private sector insurers, Treasury is proposing the following methodology for allocating direct earned premiums across all insurance companies that participate in the residual market mechanism.

First, premiums written by a servicing carrier, on behalf of a State residual market insurance entity and ceded to such an entity shall not be included as “Direct Earned Premium” for purposes of calculation of that servicing carrier’s deductible.

Second, premium distributed to or assumed by State residual market participants, whether directly from the State residual market insurance entity or as quota share insurers of risks written by servicing carriers, is included in “Direct Earned Premium” for purposes of calculation of each pool participant’s deductible.

These two proposed provisions would allocate risk within a State residual market mechanism to the ultimate risk bearers. Because servicing carriers do not hold the entire risk for the policies that they service for the State residual market insurance entity, the premium from those policies should not fully accrue to the servicing carrier. The servicing carrier does absorb risk within the State residual market mechanism, and the appropriate portion of such risk would be allocated back to the servicing carrier and other residual market participants in the second step. The net effect of these offsetting exclusions and inclusions will be no change in total industry-wide “Direct Earned Premium,” but rather a reallocation to account for the unique nature of State residual market insurance entities.

The following provides an illustration as to how insurers that participate in State residual market insurance mechanisms should calculate their “direct earned premium” for purposes of calculating an “insurer deductible” as defined in section 102(7):

(1) Start with the appropriate measure of direct earned premium as specified in 31 CFR 50.5(d)(1) or 50.5(d)(2). That measure would include appropriate adjustments for personal insurance coverage as described in section 50.5(d)(1).

(2) Subtract the value of direct earned premium earned by servicing carriers and ceded to State residual market insurance entities if those direct earned premiums are reported in step 1.

(3) Add direct earned premium assumed from or distributed by State residual market insurance entities to insurers participating in the State residual market mechanism.

Although no report or information is requested or proposed at this time, Treasury may later request that the administrator of a qualifying State residual market entity provide Treasury with certified information about the aggregate premium and losses, and participant allocation information that it provides to participating insurance companies if, and to the extent, deemed to be needed by Treasury to verify insurers' "deductible" calculations.

C. Other State Residual Market Insurer Issues

Treasury has not yet issued regulations regarding the federal share of insured losses as described in section 103(e)(1)(A) of the Act; however, consistent with the treatment of premium income described above, Treasury is considering proposing that insured losses arising from policies insured through State residual market insurance entities described in section 103(d)(2)(B) be calculated for each residual market insurance participant based on each such insurer's share of the insured losses of the State residual market entity as allocated to the insurer by the residual market entity. Treasury is also considering proposing that the State residual market insurance entity provide an allocation of insured losses to each participant and other information related to the sharing of insured losses among residual market participants as part of regulations issued under the claims verification process. Treasury specifically solicits comment in these areas.

As regulations regarding the Federal share of insured loss and the claims verification process are developed, Treasury will also be considering the general issue of

how the insolvency of insurers under the Program will be addressed, and in particular how the insolvency of a residual market participant or a servicing carrier affects the allocation of insured losses among residual market participants. Although Treasury has no specific proposal, Treasury also solicits comment on these issues.

D. Disclosure

In Interim Guidance II, Treasury did not require disclosures under section 103(b)(2) of the Act by insurers that fall under section 102(6)(A)(iv), if such State residual market and workers' compensation fund insurers did not have sufficient information to make such disclosures under section 103(b)(2), pending issuance of final regulations. Treasury is still evaluating the applicability of the disclosure requirement on certain insurers in this category and solicits information on this issue.

II. Procedural Requirements

[This proposed rule is a significant regulatory action and has been reviewed by the Office of Management and budget under the terms of Executive Order 12866.]

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. The Act itself requires State residual market insurance entities and State workers' compensation funds to participate in the Program, and these entities or funds are generally not small entities.

The Act itself requires all licensed or admitted insurers to participate in the Program. This includes all insurers regardless of size or sophistication. Although insurers that participate in sharing profits and losses of a State residual market insurance

entity or State workers' compensation fund may include small entities, the proposed rule is based on existing business practices of residual market entities in determining the impact on participating insurers. The Act also defines property and casualty insurance to mean commercial lines without any reference to the size or scope of the commercial entity. Accordingly, any economic impact associated with the proposed rule flows from the Act and not the proposed rule. However, the Act and the Program are intended to provide benefits to the U.S. economy and all businesses, including small businesses, by providing a federal reinsurance backstop to commercial property and casualty insurance policyholders and spreading the risk of insured loss resulting from an act of terrorism. Accordingly, a regulatory flexibility analysis is not required.

List of Subjects in 31 CFR Part 50

Terrorism risk insurance.

Authority and Issuance

For the reasons set forth above, 31 CFR part 50 is proposed to be amended as follows:

PART 50 – TERRORISM RISK INSURANCE PROGRAM

1. The authority citation for part 50 continues to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 321; Title I, Pub. L. 107-297, 116 Stat. 2322 (15 U.S.C 6701 note).

2. Subpart D of part 50 is proposed to be amended by adding §§ 50.30, 50.33, 50.35, and 50.36 to read as follows:

§ 50.30 General participation requirements.

(a) Insurers. As defined in § 50.5(f), all State residual market insurance entities and State workers' compensation funds are insurers under the Program even if such entities do not receive direct earned premiums.

(b) Mandatory Participation. State residual market insurance entities and State workers' compensation funds that meet the requirements of § 50.5(f) are mandatory participants in the Program subject to the rules issued in this Subpart.

(c) Identification. Treasury will release and maintain a list of State residual market insurance entities and State workers' compensation funds at www.treasury.gov/trip. Procedures for providing comments and updates to that list will be posted with the list.

§ 50.33 Entities that do not share profits and losses with private sector insurers.

(a) Treatment. A State residual market insurance entity or a State workers' compensation fund that does not share profits and losses with a private sector insurer is deemed to be a separate insurer under the Program.

(b) Premium calculation. A State residual market insurance entity or a State workers' compensation fund that is deemed to be a separate insurer should follow the guidelines specified in § 50.5(d)(1) or 50.5(d)(2) for the purposes of calculating the appropriate measure of direct earned premium.

§ 50.35 Entities that share profits and losses with private sector insurers.

(a) Treatment. A State residual market insurance entity or a State workers' compensation fund that shares profits and losses with a private sector insurer is not deemed to be a separate insurer under the Program.

(b) Premium and loss calculation. A State residual market insurance entity or a State workers' compensation fund that is not deemed to be a separate insurer should continue to report, in accordance with normal business practices, to each participant insurer its share of premium income and insured losses, which shall then be included respectively in the participant insurer's direct earned premium or insured loss calculations.

§ 50.36 Allocation of premium income associated with entities that do share profits and losses with private sector insurers.

(a) Servicing Carriers. For purposes of this Subpart, a servicing carrier is an insurer that enters into an agreement to place and service insurance contracts for a State residual market insurance entity or a State workers' compensation fund and to cede premiums associated with such insurance contracts to the State residual market insurance entity or State workers' compensation fund. Premiums written by a servicing carrier on behalf of a State residual market insurance entity or State workers' compensation fund that are ceded to such an entity or fund shall not be included as direct earned premium (as described in § 50.5(d)(1) or 50.5(d)(2)) of the servicing carrier.

(b) Participant Insurers. For purposes of this Subpart, a participant insurer is an insurer that shares in the profits and losses of a State residual market insurance entity or a State workers' compensation fund. Premium income that is distributed to or assumed by participant insurers in a State residual market insurance entity or State workers' compensation fund (whether directly or as quota share insurers of risks written by servicing carriers), shall be included in direct earned premium (as described in § 50.5(d)(1) or 50.5(d)(2)) of the participant insurer.

Dated:

Wayne A. Abernathy

Assistant Secretary of the Treasury